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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. BRADLEY SCOTT HELLER, Defendant and Appellant.	A102566 (Contra Costa County Super. Ct. No. 20359-6)

Bradley Scott Heller appeals a judgment sentencing him to state prison for a six-year term based on a conviction of a lewd act on a child under 14 years of age. (Pen. Code, § 288, subd. (a).) We reverse a concurrent sentence for attempted lewd act on a child under 14 years of age (Pen. Code, § 288, subd. (a), & § 664) but otherwise affirm.

PROCEDURAL BACKGROUND

An information filed on March 19, 2002, charged defendant with one count of continuous sexual abuse. (Pen. Code, § 288.5.) The matter came up for trial on February 20, 2003. At the close of evidence, the court granted the prosecutor's motion to strike the allegations of "substantial sexual conduct" in the information. As amended, the information charged that defendant "did unlawfully engage in three or more acts of lewd and lascivious conduct with the child." The jury found defendant not guilty of continuous sexual abuse but found him guilty of both a lewd or lascivious act involving a child under the age of 14 (Pen. Code § 288, subd. (a)) and an attempted lewd or lascivious act involving a child of that age. (Pen. Code, § 288, subd. (a) & § 664.) The

trial court sentenced defendant to a six-year term for the conviction of lewd or lascivious act and a concurrent three-year term for the conviction of attempted lewd or lascivious act. Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

The record contains a large body of testimony concerning defendant and the victim's mother, Heidi R., that has little relevance to the present appeal. It suffices to say that defendant and Heidi were both natives of a small Illinois town and had known each other since their teenage years. Defendant lived with Heidi's sister at his own mother's residence in Martinez, California. Fleeing a broken relationship, Heidi arrived in Martinez in April 1998 with two children, the victim, a girl, age 11 at time of trial, and a younger boy. She and her children were taken in by defendant's mother. The sister moved out less than two weeks later, and defendant and Heidi entered into an unstable relationship, marked by substance abuse and mental illness. Child Protective Services removed the two children from Heidi's custody in July 1999, but returned them to her care six months later after she addressed her substance abuse problems. At this time, Heidi lived with defendant at his own residence and worked nights as a waitress. The child abuse was alleged to have occurred in the last half of the year 2000 after the victim stopped seeing her therapist.

On January 4, 2001, while watching a television program about sexual relations between young girls and older men, the victim confided to her mother that defendant had put his penis in her mouth. She gave her mother more particulars about other sexual acts in the succeeding days and spontaneously volunteered certain information to a physician engaged in a physical examination. About a week later, she participated in an hour and a half interview with a social worker at the Children's Interview Center of Child Protective Services. At trial, a videotape of the interview was played to the jury. The victim also testified at trial and responded to a series of questions concerning defendant's sexual acts.

The victim reported that defendant engaged in repeated initiatives to induce her to make oral contact with his penis or to touch his penis with her hand. While some of the child's testimony was tied to particular dates or events, much of the testimony was

generic in nature, consisting of vaguely described conduct alleged to be repeated over time. For example, she testified that defendant put his penis in her mouth "a lot." When questioned further, she said he engaged in the act more than five times and half the time something nasty came out of the penis. In addition, she testified that defendant once put his penis in her butt and in her private part and once tried to French kiss her.

Defendant presented a vigorous defense by attacking the child's credibility through an expert witness and the testimony of the foster parents who had once cared for her. He took the stand in his own behalf and denied any impropriety. Nevertheless, the jury relied on the child's testimony in reaching its decision.

DISCUSSION

A. Lesser Included Offenses

In his first assignment of error, defendant challenges the conviction for attempted lewd and lascivious act on a child under the age of 14 in violation of Penal Code section 288, subdivision (a), on the ground that "multiple convictions may *not* be based on necessarily included offenses." (*People v. Pearson* (1986) 42 Cal.3d 351, 355; *People v. Moran* (1970) 1 Cal.3d 755, 763; *People v. Bauer* (1969) 1 Cal.3d 368, 375.)

As submitted to the jury, the case involved two layers of lesser included offenses. First, when the trial court granted the prosecutor's motion to strike the allegations of "substantial sexual conduct" in the information, the crime of lewd and lascivious act on a child under section 288, subdivision (a), became a lesser included offense of continuous sexual abuse under section 288.5 Without this amendment of the information, section 288, subdivision (a), would not be such a lesser included offense. As explained in *People v. Avina* (1993) 14 Cal.App.4th 1303, 1313, "[s]ection 288 requires the specific intent of 'arousing, appealing to, or gratifying the lust or passions or sexual desires of [the defendant] or of the child . . . .' A conviction for section 288.5, in contrast, could be based upon a course of substantial sexual conduct within the meaning of section 1203.066, subdivision (b), which requires no specific intent. . . . [S]uch acts could be engaged in for nonsexual purposes, for example for the infliction of pain, or to appeal to the sexual interest of a third person. Because section 288.5 could be violated without

necessarily also violating section 288, the latter is not necessarily included within the former . . . ." But following the amendment striking the allegation of substantial sexual conduct, the status of section 288 as a lesser included offense of section 288.5 could not be more clear. Section 288.5, subdivision (a), was then explicitly alleged to consist of "three or more acts of lewd or lascivious conduct under Section 288."

Secondly, under Penal Code section 1159, an attempted crime is equivalent to a lesser included offense of a completed crime.[1] A crime may, however, be defined in a manner that precludes the possibility of an attempt. (See 1 Witkin, Cal. Criminal Law (3d ed. 2000) Elements, § 53, pp. 262-263.) Section 288.5 falls within this unusual category because it punishes a course of conduct consisting of at least three completed actions -- in the case of the amended information, three acts of lewd and lascivious conduct under section 288. Hence, a series of attempted lewd and lascivious acts would not serve to prove the course of conduct punished by section 288.5. It follows that an attempted lewd and lascivious act is a lesser included offense to an offense included in 288.5, i.e., a lewd and lascivious act, but it is not a lesser included offense to section 288.5 itself.

Since the jury acquitted defendant of the charge of continuous sexual conduct, we are not concerned with the effect of convictions under both section 288.5 and section 288. (See *People v. Johnson* (2002) 28 Cal.4th 240, 248; *People v. Torres* (2002) 102 Cal.App.4th 1053, 1056-1060.) Again, since the jury convicted defendant under 288 as a lesser included offense of section 288.5, we need not address the effect of an information that charges both offenses. (*People v. Alvarez* (2002) 100 Cal.App.4th 1170.) Rather, the question presented in this appeal is whether a defendant charged with continuous sexual abuse under section 288.5, predicated on three separate acts violating section 288, subdivision (a), can be convicted of two lesser included offenses, the completed offense of a lewd act on a child under section 288, subdivision (a), and an attempted lewd act on a child.

[1] Section 1159 provides: "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

The Attorney General argues that, with the amendment of the information to delete the allegation of substantial sexual conduct, the charge of continuous sexual abuse under section 288.5 required the prosecution to prove three separate lewd and lascivious acts under section 288. After acquitting defendant of the charged violation of section 288.5, the jury could still convict him of two of the three charged acts of sexual abuse under section 288 -- one a completed act and the other an attempted act -- provided all the jurors agreed on the same act.[2] Satisfying the requirement of unanimity, the trial court properly delivered an instruction requiring all jurors to "agree that [defendant] committed the same act or acts" with respect to the lesser included offenses.

The flaw in this analysis lies in the vertical nature of lesser offenses. An attempted lewd and lascivious act is a lesser included offense to a lewd and lascivious act, but it is not a lesser included offense to continuous sexual abuse. The jury could not find the defendant guilty of an attempted lewd and lascivious act that is independent of the lewd and lascivious act for which he was convicted. While a sexual offense consisting of such an independent attempt could be separately charged under section 288.5, subdivision (c), it was not in fact alleged in the information and it is not an offense included in the charge of continuous sexual abuse. Alternatively, the jury could not find the defendant guilty of the lesser included offense of a lewd and lascivious act and also an offense included therein, i.e., an attempted lewd and lascivious act. It has long been held in California that a defendant may not be convicted of both a greater and a lesser included offense. Thus, "[w]hen the jury expressly finds defendant guilty of both a greater and lesser offense, . . . there is no implied acquittal of the greater offense. If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed." (*People v. Moran, supra,* 1 Cal.3d 755, 763.)

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[2] In denying a motion to set aside the verdict, the trial court found the convictions for violation of section 288, subdivision (a), and attempted violation of that section "were clearly lesser includes *[sic]* of the charged offenses that went to the jury, based on the allegations and the requirements of proof, . . ."

In recognition of the logical vertical nature of the lesser offenses, the court properly instructed: "The crime of lewd and lascivious conduct with a child is a lesser crime to that of continuous sexual abuse of a child. The crime of attempted lewd and lascivious conduct with a child is a lesser crime to that of lewd and lascivious conduct with a child." The jury instructions, however, proceeded to refer to the lesser included offense in the plural. Thus, the court instructed: "you are to determine whether the defendant is guilty or not guilty of the crime charged in Count One or of any lesser crimes." This reference to lesser included crimes in the plural gave apparent sanction to the verdict the jury rendered, convicting defendant of two lesser included offenses and was in error.

We conclude that the conviction for an attempted lewd and lascivious act in violation of section 288, subdivision (a) must be reversed. Since the trial court imposed a concurrent sentence for this conviction, our holding does not affect the term of imprisonment imposed by the judgment.

B. Generic Testimony

In three related assignments of error, defendant challenges the body of evidence introduced by the prosecution consisting of nonspecific, or "generic," testimony of indistinguishable incidents, lacking details regarding the time, place and circumstances of various alleged assaults. The issues presented by these assignments of error were carefully considered in *People v. Jones* (1990) 51 Cal.3d 294, which affirmed four convictions of lewd and lascivious acts on children under the age of 14 based on evidence of guilt lacking specific reference to a time or place. Defendant argues that the decision was in error and directs our attention to the dissent. But as an intermediate court of review, we are bound by the majority decision of the Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Any reconsideration of the decision must come from the high court itself. In considering the assignments of error, we will note only the dispositive nature of the *Jones* decision.

First, defendant argues that generic testimony is insufficient, as a matter of law, to support conviction on a specific act and therefore fails to satisfy the due process

requirement of guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Addressing the identical issue, the *Jones* court asked: "Does the victim's failure to specify precise date, time, place or circumstance render generic testimony insufficient? Clearly not. As many of the cases make clear, the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction." (*People v. Jones, supra,* 51 Cal.3d 294, 315.) Rather, the testimony is sufficient to support a conviction where the victim describes "*the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." (*People v. Jones, supra,* at p. 316.)

Secondly, defendant contends that, where the evidence against a defendant is based on generic testimony, the jury is necessarily precluded from agreeing on specific incidents and therefore a verdict based on such generic testimony does not satisfy the requirement of jury unanimity under California law. (See *People v. Adames* (1997) 54 Cal.App.4th 198, 207; *People v. Melendez* (1990) 224 Cal.App.3d 1420, 1433, disapproved on other grounds in *People v. Majors* (1998) 18 Cal.4th 385, 408; Cal. Const., art. I, § 16.) The *Jones* court, however, "reject[ed] the contention that jury unanimity is necessarily unattainable where testimony regarding repeated identical offenses is presented in child molestation cases. In such cases, although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described. [¶] . . . [E]ven generic testimony describes a repeated series of *specific,* though indistinguishable,

acts of molestation. [Citation.] The unanimity instruction assists in focusing the jury's attention on each such act related by the victim and charged by the People. We see no constitutional impediment to allowing a jury, so instructed, to find a defendant guilty of more than one indistinguishable act, . . ." (*People v. Jones, supra,* 51 Cal.3d 294, 321.)

Thirdly, defendant argues that he was denied his constitutional right to defend because of the generic nature of the prosecution's evidence against him. The *Jones* decision notes that "the right to defend has two related components, namely, the right to *notice* of the charges, and the right to *present a defense* to those charges." (*People v. Jones, supra,* 51 Cal.3d 294, 317.) With respect to the component of notice, the court concluded that, "given the availability of the preliminary hearing, demurrer and pretrial discovery procedures, the prosecution of child molestation charges based on generic testimony does not, of itself, result in a denial of a defendant's due process right to fair notice of the charges against him." (*Id.* at p. 318.)

Similarly, the court held that generic testimony did not deprive the defendant of a due process right to defend against the charges against him: "Usually the trial centers on a basic credibility issue -- the victim testifies to a long series of molestations and the defendant denies that any wrongful touchings occurred. [Citations.] . . . [N]either alibi nor wrongful identification is likely to be an available defense. [Citation.] [¶] Even when an alibi defense is tendered, there is no reason why the jury would be less inclined to credit the defense as applied to appropriate counts, merely because the victim's generic testimony has implicated the defendant in additional counts or offenses not challenged by the alibi. Indeed, the fact that the defendant has established an alibi covering some of the time periods alleged in the information could significantly undermine the victim's testimony as to the remaining counts." (*People v. Jones, supra,* 51 Cal.3d 294, 319.)

The conviction for attempted violation of Penal Code section 288, subdivision (a), is reversed and in all other respects the judgment is affirmed.

Swager, J.

We concur:

Marchiano, P. J.

Stein, J.

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